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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1987

BENELLA CAMINITI, COMMITTEE FOR PUBLIC SHORELINES RIGHTS,
Petitioners,
v.
BRIAN J. BOYLE, COMMISSIONER OF PUBLIC LANDS; ROBERT S. O'BRIEN, TREASURER OF THE STATE OF WASHINGTON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I. STATEMENT OF CASE

A. Procedural History.

In 1982, the Washington State Legislature passed Wash. Rev. Code 79.90.105 which allows residential owners to construct private recreational docks on public aquatic lands abutting their property without payment of lease fees to the state.[1] Prior to passage of this statute, a residential waterfront

[1] 1982 Wash. Laws, 1st ex. s. ch. 21, §16.

owner was required by state land management policies to pay lease fees for a recreational dock located on state-owned aquatic land, although those policies were by no means uniformly enforced statewide. [2]

The principal feature of the 1982 statute is the elimination of lease fees. Both before and after passage of the statute, federal, state and local governments regulated dock construction through various police power measures.[3] In addition, the state retains the right to regulate dock construction through various lease provisions.[4]

On February 21, 1986, petitioners filed an original action in the Washington State Supreme Court seeking a Writ of Mandamus to prevent state officers from enforcing Wash. Rev. Code 79.90.105. The case was briefed and argued on an agreed statement of facts. On February 13, 1987, the State Supreme Court issued its decision denying petitioner's Writ of Mandamus and upholding the constitutionality of Wash. Rev. Code 79.90.105.

After receipt of the adverse ruling, petitioners filed a motion for reconsideration on March 3, 1986 and a motion for disqualification of justices on April 3, 1986. Petitioners' motions raised for the first time issues relating to disqualification of five

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[2] Pet., A-18, 19. 107 Wn.2d at 674-5. Respondents below noted that while approximately 40,000 docks existed on navigable lakes statewide, only about 370 docks were under state lease. It was the state's effort to bring about greater compliance which resulted in passage of Wash. Rev. Code 79.90.105. 107 Wn.2d at 674-5.

[3] The federal government exercises regulatory control over recreational docks through the Commerce Clause, the navigational servitude and the Rivers & Harbors Act, 33 U.S.C. §403 *et seq.* The state exercises regulatory control over recreational docks through the Shoreline Management Act (ch. 90.58 Wash. Rev. Code), the Hydraulics Act (Wash. Rev. Code 75.20.100) and the flood control laws (Wash. Rev. Code 86.16.080). Local governments control recreational docks through the Shoreline Management Act and zoning under the Planning Enabling Act (ch. 36.70 Wash. Rev. Code). The state regulates recreational docks under Wash. Rev. Code 79.90.105 through powers of revocation to protect waterward access, ingress rights, the public health and safety. Wash. Rev. Code 79.90.105 itself regulates recreational dock construction by limiting coverage to only abutting residential owners, excluding harbor areas, and by limiting use to private recreational. Finally, the statute only authorizes a license to use state property, which license may be revoked at any time by the Legislature. Pet., A-17, 107 Wn.2d at 673.

[4] Wash. Rev. Code 79.90.105. The statute only eliminates lease *fees*.

members of the court. Petitioners alleged these five justices were waterfront property owners who benefited from the ruling upholding the statute's constitutionality. Respondents submitted authorities in opposition to the motions.

On July 29, 1987, the State Supreme Court, after considering the record and authorities submitted denied petitioners' motions for reconsideration and disqualification. On October 27, 1987, petitioners filed this petition for certiorari.

B. **Factual Record.**

In support of their motions, petitioners submitted conflict of interest statements which showed only that five justices owned waterfront property in 1985. In response, the state stressed that petitioners' factual allegations were inadequate to raise the disqualification issue in two major respects.

First, the conflict of interest statements submitted by petitioners had been filed with the state in 1986 and only showed property ownerships held in 1985, the year before this case was filed.[5] Thus, the record currently before this Court contains no evidence that any justice held any waterfront property interest while this case was pending before the state court.

Second, even assuming waterfront ownerships were held during pendency of the case, petitioners failed to submit evidence that waterfront ownerships were of a type affected by the statute. Not all waterfront owners are affected by the statute which is quite limited in scope. The statute affects only (1) residential owners (2) who abut state-owned aquatic land (3) other than harbor areas (4) where the use is exclusively for private recreational purposes and (5) where the area is not subject to prior rights.[6]

Thus, the statute does not affect, for example, a waterfront owner (1) who does not reside on the upland property or whose

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[5] Wash. Rev. Code 42.17.240 requires all judges to file a Conflict of Interest Statement with the Public Disclosure Commission. The Conflict of Interest Statement is filed annually between January 1 and April 15 and discloses financial interests held in the previous calendar year. The 1986 statements disclose financial interests held by the justices in 1985, the year before this case was filed. The various statements submitted by petitioners were filed between January 21 and April 10, 1986 and disclosed ownerships held in 1985.

[6] Wash. Rev. Code 79.90.105.

upland ownership is held for business, commercial or investment purposes; or (2) whose ownership abuts privately owned aquatic lands; or (3) whose ownership abuts state-owned aquatic land in a harbor area;[7] or (4) where dock use is in part for a nonprivate recreational purpose; or (5) where the abutting public aquatic land is subject to prior rights, such as an existing state lease or authorized use. In short, there are at least five conditions, all of which must be met, for the statute to be triggered.

The factual record of this case does not establish if any justice held waterfront property while the case was pending nor, assuming a waterfront ownership was so held, whether any of the five conditions were met.

C. **Factual Categories.**

Assuming that some justices owned waterfront property while this case was pending, four categories of potential fact situations may exist, and in only two of these could a conflict even arguably exist.

1. **Waterfront Owner—Statute Not Applicable.**

As previously noted, not all waterfront property owners are affected by the challenged statute. Wash. Rev. Code 79.90.105 allows a residential waterfront owner to construct a dock on public aquatic lands adjacent to his ownership for private recreational purposes. The statute does not apply to aquatic land which is privately owned,[8] to waterfront property held for business or investment purposes, or to any owner other than a residential owner. Thus, a waterfront owner is affected by the statute only if he or she owns upland property abutting public aquatic lands as a residential owner.

2. **Statute Applicable—Dock Construction Not Possible.**

Waterfront property abutting public aquatic land may not always be suitable for dock construction notwithstanding Wash.

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[7] Under Wash. Const., art. 15, all harbor areas are in state ownership and under the jurisdiction of the State Harbor Line Commission.

[8] Aquatic land may be privately owned in two situations: (1) the state may have sold the tide or shorelands to a private party or (2) the body of water may not be navigable. The state only claims title to the beds and shores of navigable bodies of water. Wash. Const. art. 17. The beds and shores of nonnavigable bodies of water are typically owned by the abutting upland owners.

Rev. Code 79.90.105. The State Shorelines Act may prohibit dock construction in an area for environmental reasons.[9] High bluff property may drop into deep water where dock construction is not possible. Expansive tide flats may make dock construction impossible. The navigational servitude could prevent dock construction.[10] In these situations, dock construction while permissible by Wash. Rev. Code 79.90.105 may not actually be possible for other reasons.

3. **Statute Applicable—Dock Construction Possible But Not Practicable.**

Dock construction may be possible, but not desirable or practicable.

Recreational docks are commonplace in Washington's popular recreational lakes. Dock construction in these lakes is feasible because of sheltered weather, shallow banks, soft bed, and a constant water depth.

Very few private recreational docks exist, however, on saltwater, *i.e.*, on the Pacific Ocean or Puget Sound. Dock construction on Puget Sound particularly is complicated by an eighteen foot tide, high banks, rapid drop-offs, expansive tideflats and exposed weather and water conditions. Construction of a Puget Sound dock requires a substantial investment, industrial equipment, heavy materials and a suitable location.

Thus, while Puget Sound waterfront owners may take advantage of a rent-free dock under Wash. Rev. Code 79.90.105, in most instances no reasonable person would seriously consider the financial and regulatory undertaking necessary to construct such a dock, especially where the use is limited to private recreational purposes.[11]

Few private recreational docks exist on Washington's navigable rivers. As a practical matter, construction of a dock on

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[9] Ch. 79.90 Wash. Rev. Code.

[10] A dock would not be permitted to obstruct, for example, a navigable river used in interstate commerce.

[11] Respondents do not suggest that private recreational docks do not exist on Puget Sound. Such docks do exist in various sheltered bays and inlets where conditions are suitable, i.e., Gig Harbor, Eagle Harbor, Friday Harbor, Deer Harbor and West Sound. These docks are, however, the exception not the rule.

a river is seldom necessary or desired. Canoes, kayaks and rafts are typically lifted into a river and larger boats use public ramps.

4. Statute Applicable—Existing Dock.

A justice may own waterfront property abutting public aquatic land outside a harbor area with a private recreational dock. Wash. Rev. Code 79.90.105 applies to this situation. The dock is rent-free and does not require a state lease under Wash. Rev. Code 79.90.105. If the statute is invalid, the dock owner may be required to obtain a state lease with a rental payment.[12]

II. SUMMARY OF ARGUMENT

An adequate factual record has not been established in this case. The record does not establish whether any justice held a disqualifying property interest while the case was pending before the state court; nor does it establish whether any waterfront ownership interest held could be affected by the statute. Based upon the current record, this Court may only speculate as to the various interests of members of the state court.

This Court should not grant certiorari and remand for development of a factual record. Petitioners raised this issue in the eleventh hour and only after an adverse ruling by the State Supreme Court. The information submitted could have been submitted prior to briefing, argument and decision by the state court. More and complete data could have been compiled from available public records if a truly objectionable conflict could be identified.[13] Petitioners' post-decision fishing expedition is inappropriate and should not be blessed by this Court. If an objectionable conflict exists, petitioners could have established the necessary record in a timely and appropriate fashion.

Even assuming that some justices owned waterfront property while the case was pending, and further assuming that those ownerships were potentially affected by the statute, disqualification for constitutional due process reasons is highly doubtful.

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[12] This is Washington State's long-standing policy as a landowner of requiring a lease and rent for recreational docks. No provision of law specifically requires obtaining a lease or payment of rent.

[13] Property ownerships are a matter of public record in Washington State and are on file in county auditor offices statewide.

Under the first two categories discussed above, where the statute either does not apply or where the statute does apply but dock construction is not possible, no viable theory exists to require judicial recusal. Accordingly, these two factual categories are not discussed further in this brief.

Under the latter two categories, where either the statute applies and dock construction is possible or where a dock actually does exist, the need for judicial recusal is highly doubtful. Constitutional due process requires judicial disqualification only for direct, personal, substantial and pecuniary interests in a case. Any financial interest in these situations is neither direct nor substantial; they are contingent on future events and insubstantial in value.

Petitioners' whole argument is built upon assumptions. Based on the record, this Court is forced to speculate about judicial disqualification. The justices of the state court have already considered their property interests in the context of this case and determined judicial recusal is not necessary or appropriate for the reasons discussed in this brief.

III. ARGUMENT

A. The Factual Record Does Not Support Petitioners' Arguments For Disqualification.

Petitioners argue that a justice who owns waterfront property should be disqualified from ruling on the validity of Wash. Rev. Code 79.90.105. Not all waterfront owners are affected, however, by operation of that statute. Only waterfront owners who fall within the statute's narrowly prescribed categories are affected. Two examples suffice to illustrate this point.

Example. Justice A owns a waterfront home on Lake Washington and maintains a private recreational dock extending out into the lake. Justice A, however, or his predecessor in interest, has acquired ownership of the shorelands abutting his upland property from the state. If the dock is on his privately owned shorelands, Justice A, although a private residential waterfront landowner who uses his dock exclusively for private recreational uses, is unaffected by operation of the statute.

Example. Justice B owns upland waterfront property in Puget Sound which abuts state-owned aquatic lands. The state-

owned aquatic lands, however, are located in a constitutionally established harbor area.[14] Justice B is a private residential waterfront landowner who abuts state-owned aquatic land but does not benefit in any way from Wash. Rev. Code 79.90.105.

The foregoing examples illustrate only two of the many situations in which a waterfront landowner may not benefit from the statute. By failing to establish a factual record necessary to analyze these situations, the Court is left only to speculate about the various interests of the members of the state court.

Petitioners did not raise the disqualification issue until after an adverse ruling on the merits had been issued. The information was just as available before briefing, argument and decision by the state court. More information is available on the public record regarding property ownerships and could have been obtained by petitioners. Petitioners' eleventh-hour motion for disqualification made after an adverse ruling and without supporting documentation or specific allegations is an ill-conceived fishing expedition which this Court should not condone or encourage. Petitioners had their opportunity to develop an adequate record and present it to the court in a timely and appropriate manner and have failed to do so.

B. **Constitutional Due Process.**

The due process clause of the Fourteenth Amendment is violated when a judge has a direct, personal, substantial and pecuniary interest in the case. The three leading Supreme Court decisions are discussed below.

Tumey v. Ohio, (1926).[15] In **Tumey**, the issue was presented in the context of the criminal justice system. The compensation of a judge in a small Ohio village was dependent in part upon convictions obtained. For each conviction, money was placed in a fund used to compensate the judge. No money was placed in the fund for a dismissal or acquittal. The Supreme Court held that the judge had a direct, personal, pecuniary interest in convicting the defendant:

> But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of

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[14] Wash. Const. art. 15. See also n. 7, supra.

[15] 273 U.S. 510 (1926).

> law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 U.S. at 523. In **Tumey**, the judge had a direct financial interest in convicting criminal defendants.

In re Murcheson, (1955).[16] In this case, a judge served as a "one-man grand jury". After the proceeding, the judge required a witness to show cause why he should not be punished for criminal contempt for his conduct and false testimony. The judge tried and convicted the defendant for contempt. The Supreme Court reversed. The due process requirement of an impartial tribunal was violated when the same judge presided at both proceedings:

> A fair trial in a fair tribunal is a basic requirement of due process. . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

349 U.S. at 136. In **Murcheson**, the personal liberty of a defendant was directly at stake.

Aetna v. Lavoie, (1986).[17] This 1986 Supreme Court decision vacated a 5-4 Alabama Supreme Court ruling on due process grounds when one of the five justices in the majority failed to recuse himself. When Aetna paid only $1,650 of a $3,028 hospital bill, the insured sued for bad faith failure to pay. The jury awarded $3.5 million in punitive damages against Aetna. The Alabama Supreme Court upheld the award in a 5-4 decision. Justice Embry, who wrote the majority opinion, did not disclose the bad faith failure to pay lawsuits he had previously filed and had pending against two other insurance companies.

In the first case, Justice Embry had sued Maryland Casualty for failing to pay for the loss of a mink coat. In the second case, Justice Embry had filed a class action against Blue Cross for failure to pay claims of state employees. The class consisted of all state employees including all Alabama Supreme Court Justices.

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[16] 349 U.S. 133 (1955).

[17] 475 U.S._____, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986).

The Supreme Court held Justice Embry had a direct, personal, substantial, and pecuniary interest in the **Aetna** decision: the increased settlement value of his two cases. But the Court held that any interest the remaining members of the Court had as a member of the class action was highly speculative and contingent.[18]

Conclusions. In the first two factual categories presented, where the statute either does not apply or where the statute does apply but dock construction is not possible, no viable theory exists to require judicial recusal. Applying these constitutional principles to the two remaining factual categories, this court should conclude as follows.

Constitutional due process requires judicial disqualification only where there exists a direct, personal, substantial and pecuniary interest in the subject matter of a case. In neither of the factual categories presented, where a dock now exists or where one could be built, does the due process standard apply. Any financial interest in these situations is neither direct nor substantial.

The financial interest is not direct because it is contingent on future events. In the situation where a dock currently exists, financial interest is contingent upon Natural Resources even requiring a lease and rent. If Wash. Rev. Code 79.90.105 were declared unconstitutional, no provision of law would require the state to obtain a lease or charge rent. This has simply been long-standing state aquatic land management policy which by no means has been uniformly enforced.

Where a dock does not exist but could be built, financial interest is contingent in three respects. First, it is contingent on the landowner even wanting a dock. If a landowner does not want a dock, he certainly does not have a financial interest at stake.

Second, financial interest is contingent upon the landowner being able to and actually obtaining all necessary federal, state and local permits. A dock which may be built today might not necessarily be allowed at some future time.

Third, the financial interest is contingent upon the land-

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[18] 89 L. Ed. at 836.

owner investing a substantial amount of money to build the dock. Ironically, the landowner must spend many thousands of dollars in order to save approximately $100 a year in annual rent. This is not the type of direct financial interest contemplated by constitutional due process.

Finally, the interest is not substantial. In **Aetna**, Justice Embry received a $30,000 settlement in one of the cases. A future and contingent annual dock rental of approximately $100 per year is not the type of substantial interest which requires judicial disqualification under the due process clause.[19]

The foregoing discussion has been limited to the constitutional due process requirements for judicial disqualification. As noted by this Court in **Aetna**, the due process clause marks only the outer boundaries of judicial disgualification. Congress and the states may impose more rigorous standards.[20] The only issue presented to this Court, however, is based upon constitutional due process.

IV. CONCLUSION

Petitioners' case is built only upon assumptions. Rather than speculating about petitioners' unsupported allegations, this Court should more properly exercise deference to the decision of the State Supreme Court justices who duly considered their financial interests and determined judicial recusal was not required for the reasons discussed herein. This Court should deny the petition for certiorari.

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[19] The record in this case indicates that prior to the effective date of Wash. Rev. Code 79.90.105, the state had approximately 370 private recreational docks under lease for a total annual income of approximately $35,000, or an average of about $100 per year per dock. The record also shows that the state expended nearly this amount in administrative costs to administer the dock leasing program. Agreed Statement of Facts. 102 Wn.2d at 664 (Pet. A-8).

[20] 89 L. Ed. at 837.

Respectfully submitted this 25 day of November, 1987.

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